Supreme Court, U.S.
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No. 95-1117

In the
Supreme Court of the United States
OCTOBER TERM, 1995

WALTER R. LEGER
D/B/A OFFICE CHAIR MAINTENANCE CO.,
Petitioner,

v.

MITCHELL ADAMS, AS HE IS
COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May a Massachusetts taxpayer be denied the protection of the Due Process Clause of the Fourteenth Amendment of the United States Constitution when the Massachusetts Commissioner of Revenue fails to provide taxpayer with either a predeprivation or prompt postdeprivation notice and hearing and seizes taxpayer's home on the "mere assertion" that the taxpayer may owe Massachusetts sales taxes.

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Pursuant to Supreme Court Rule 15, Petitioner Walter R. Leger submits this Reply to Respondent's Brief in Opposition.

I. ARGUMENT

A. OVERVIEW

The issue before this Court is seizure.

The Commissioner of Revenue of Massachusetts ("Commissioner") seized taxpayer's residence more than three years ago by placing a lien[1] on the property without affording the taxpayer either a predeprivation hearing or a postdeprivation hearing (prompt or otherwise).

This seizure was without any justifiable reason:

(a) there was no determination by an independent body that any taxes were due and owing; and

(b) there was no claim that the future collection of any such taxes, if owed, were in jeopardy unless the taxpayer's home was seized. See 830 CMR 62C.26.1, paragraph (15) attached hereto as Appendix A. Respondent, on page 2 of its Brief in Opposition, admits that the seizing of taxpayer's home was not because the collection of taxes were in jeopardy, but merely as a collection device.

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1. See Connecticut v. Doehr, 501 U.S. 1, 12 (1991)

The Petitioner wishes to emphasize that, contrary to Respondent's repeated assertions, this is not a tax collection case. It is a "tax assertion" case. The Commissioner is asserting a claim, unproven before an independent body, that taxes are due and owing.

The substantive sales tax issue is not before the Court. Consequently, that portion of the Respondent's Brief in Opposition having to do with a hearing by the Commissioner's Appeal and Review Bureau "upholding the validity of the underlying tax" will not be discussed as it is irrelevant to the issue herein (see Respondent's Brief in Opposition, pages 2 and 12).

The Commissioner asserts that if Petitioner's legal premise is accepted -- that there must be a notice and hearing before an individual is finally deprived of a property interest -- then the trial courts in Massachusetts would be inundated with 70,000 cases for which a hearing would have to be held. See Respondent's Brief in Opposition, p. 3, par. 3.

This observation is interesting for several reasons:

(1) According to the Commissioner's own admission, there are up to 70,000 constitutional violations every year in which the seizing of a taxpayer's property becomes a collection device without any independent determination that any taxes are due and owing or that the collection of taxes are in jeopardy.

(2) The issue is not how many of the audits completed by the Commissioner result in a proposed increased tax assessment, but how may of the completed audits show that the collection of taxes are in jeopardy.

(3) This same "red herring" argument was used by the Commonwealth of Massachusetts and other States when they unsuccessfully tried a similar "doomsday" argument by filing an amicus brief in the case of U.S. v. Good Real Property, 114 S.Ct. 492 (1993); to wit:

> The amici states also believe that this unwarranted interpretation of the Due Process Clause of the Fifth Amendment advanced by respondent, and adopted by the Ninth Circuit, seriously impairs the ability of the states to target the real property assets of the illegal drug industry under their own state forfeiture statutes. (Page 2 of amicus brief)
>
> The Due Process Clause of the Fifth Amendment does not require preseizure notice and hearing since the states' compelling interest in fighting the illicit drug industry outweighs any personal interest in the real property. (Pages 3 and 4 of amicus brief)
>
> ... The holding of the court below -- that seizure must be delayed until notice and an adversarial hearing is provided -- frustrates the governmental interest in protecting the welfare and safety of its citizenry by seizing real property

associated with the illicit drug industry. (Pages 7 and 8 of amicus brief)

B. REPLY TO BRIEF IN OPPOSITION

1. Case Authorities

The substance of Respondent's Brief in Opposition appears to be the reliance on three United States Supreme Court cases: (1) McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 37 (1990); (2) Reich v. Collins, 115 S.Ct. 547 (1994); and (3) National Private Truck Council v. Oklahoma Tax Commission, 115 S.Ct. 2531, 2354 (June 19, 1995).

It should be noted that each of the aforementioned cases illustrate the general proposition that great deference must be left to State courts in determining the appropriate remedy for postdeprivation hearings. However, this Court further held that any deference for State autonomy has limits and that the limitations on Federal causes of action may impose obligations on the States.

The Petitioner agrees with the aforesaid proposition and the conclusions in each of the aforementioned cases.

However, the real issue, which Respondent fails to address, is whether the Commonwealth of Massachusetts, in its so-called postdeprivation proceedings, have, in fact, satisfied the constitutional due process rights to which the taxpayer is entitled on the issue of seizure.

(1) McKesson is quoted by the Respondent, on page 6 of its Brief in Opposition, regarding the proposition that "a State need not provide predeprivation process for the exaction of taxes."

However, the material quoted by the Respondent is taken out of context and ignores the admonition of this Court that even though a State has postdeprivation procedures it still must afford the taxpayer his constitutional rights.

In fact, this Court, in McKesson, after a thorough analysis of postdeprivation procedures in Florida, concluded that Florida, in fact, did not afford the appropriate postdeprivation procedures to insure adequate limitations for State violations of constitutional rights.

Postdeprivation procedure satisfies Due Process if such postdeprivation procedure satisfies Federal constitutional rights.

> This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. McKesson at n. 17.

Petitioner wholeheartedly supports the position set forth in McKesson because it is Petitioner's position that, under the facts presently before this Court, the Commissioner's action was arbitrary and capricious, without any justification.

Consequently, under the McKesson logic, the Commissioner violated the due process rights of the taxpayer herein.

It is interesting to note that the Respondent in quoting McKesson on page 6 of its Brief in Opposition -- "[I]t is well established that a State need not provide predeprivation process for the exaction of taxes" -- omitted the beginning of that very same sentence which reads as follows:

> However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, ..., it is well established ... '"

Therefore, Petitioner believes that McKesson supports his position in that a postdeprivation hearing is allowable assuming it conforms to the guidelines set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), as well as having a postdeprivation hearing within a meaningful time. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) as cited in Petitioner's Petition for Writ of Certiorari, page 21; see also McKesson, n. 22 on p. 39.

(2) In Reich, the Court once again analyzed whether the postdeprivation proceedings of a State (Georgia) satisfied the due process rights of the taxpayer.

> The Georgia Supreme Court is no doubt right that, under McKesson, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." Due process, we

> should add, also allows the State to maintain an exclusively post-deprivation regime. Reich at 550.

In Reich, this Court held that, while a State is allowed postdeprivation procedures, Georgia violated the due process rights of the taxpayer under the Fourteenth Amendment by not having a clear and certain postdeprivation remedy as required.

The Respondent's reliance on Reich, on pages 6 and 8 of its Brief in Opposition, is misplaced. The quoted material is nothing more than part of an analysis of the issue and in both McKesson and Reich this quote, while recognizing postdeprivation procedures, held that in both of the aforementioned cases post-deprivation procedures were inadequate under due process requirements.

(3) National Private Truck Council is the third case on the same issue:

> States are afforded great flexibility in satisfying requirements of due process in field of taxation; ... Id at 2352.

In the National case the Court held that postdeprivation relief did conform to the requirements of due process.

Once again, the Petitioner would like to reiterate that he is in agreement with the proposition that the States may have either a predeprivation hearing or prompt postdeprivation hearing on the issue of seizure so long as certain due process requirements are met.

Respondent once again assiduously avoids the issue in terms of what Massachusetts offers for postdeprivation relief on the issue of seizure.

> Massachusetts provides its citizens with more than ample postdeprivation relief, as any taxpayer may seek an abatement from the Department within one year after paying a challenged tax, ..., may appeal a denial of that abatement to the Appellate Tax Board, ..., may appeal an adverse Board ruling to the Massachusetts Appeals Court, ... See Respondent's Brief in Opposition, p. 7.

None of these postdeprivation "solutions" satisfies the lack of any notice and hearing at any time on the issue of seizure.

2. Jurisdiction

The final point to be considered is the allegation made by Respondent on page 1 of its Brief in Opposition that "the issue was neither actually decided by the Supreme Judicial Court nor properly raised by the taxpayer below."

The question of where and when a Federal question should be raised is set forth in Supreme Court Practice, Seventh Edition, by Robert L. Stern et als:

> Assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the

appropriate point or points in the state court proceedings. Supreme Court Practice at 122, s. 3.17.

This issue of violation of due process rights under the Fourteenth Amendment was raised in the Complaint (see Appendix to Respondent's Brief in Opposition, p. A-14) and argued in Massachusetts Superior Court, Worcester District (see Appendix B to Petitioner's Petition for Writ of Certiorari, p. 10a), as well as having been raised, argued and decided in the Massachusetts Supreme Judicial Court.

Furthermore, if the Respondent is concerned that there had to be a specific reference to a postdeprivation hearing, please note that it was raised and argued in the aforementioned Courts. See Appendix A to Writ of Certiorari, pp. 6a-8a; and Appendix B to said Writ, pp. 18a-20a.

II. CONCLUSION

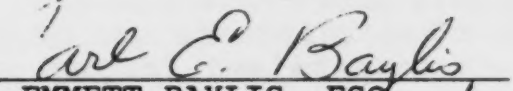
WHEREFORE, it appears that the Commissioner has neither a predeprivation nor any prompt postdeprivation hearing solely on the issue of seizure.

Consequently, the taxpayer's due process rights under the Fourteenth Amendment as set forth in numerous U.S. Supreme Court cases -- including Mathews v. Eldridge, U.S. v. Good Real Property, and Armstrong v. Manzo -- have been violated.

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review

the Opinion and Judgment of the Massachusetts Supreme Judicial Court as entered in this matter.

Respectfully submitted,
Walter R. Leger, d/b/a
Office Chair Maintenance Co.,
Petitioner, by his Attorney



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APPENDIX TO

PETITIONER'S REPLY TO

RESPONDENT'S BRIEF IN OPPOSITION

830 CMR 62C.26.1(15) 1a

APPENDIX A

830 CMR 62C.26.1

(15) Jeopardy Assessments

(a) General. If the Commissioner determines that delay may jeopardize the collection of any taxes, the Commissioner may immediately make a jeopardy assessment according to the Commissioner's best information and belief under M.G.L. c.62C, s.29. The Commissioner may make a jeopardy assessment whether the time otherwise prescribed by law or by regulation for filing the return or paying the tax has expired.

(b) Interest and penalties. A jeopardy assessment will include interest and penalties.

(c) Payment of jeopardy assessment. The amount of a jeopardy assessment is immediately due and payable. The Commissioner will make immediate demand for the amount of a jeopardy assessment.

(d) Collection of a jeopardy assessment. If the taxpayer neglects or refuses to pay the amount of a jeopardy assessment, the Commissioner may pursue any and all available remedies to collect the amount of the jeopardy assessment.

(e) Determination that collection of tax may be jeopardized. A determination that collection of any tax may be jeopardized by delay is made in each instance based on the facts and circumstances of the individual case. The determination is a matter of the

Commissioner;s discretion. The Commissioner may use the following criteria to determine that delay will jeopardize collection, but the Commissioner is in no way limited to these criteria:

1. A taxpayer is arrested by law enforcement officers with substantial amounts of cash, its equivalent, or contraband in the taxpayer's possession, which is or appears to be unreported income;

2. A taxpayer is or appears to be designing to leave Massachusetts immediately or to go into hiding immediately;

3. A taxpayer is or appears to be immediately designing to place the taxpayer's property beyond the reach of Massachusetts' taxing jurisdiction by concealing it, dissipating it, removing it from Massachusetts, or transferring it to some other person;

4. A taxpayer's financial solvency is or appears to be imperiled;

5. A taxpayer fails to file timely returns for and pay withholding, room occupancy, sales, meals, or use tax after receiving notice that such returns are past due, and the Commissioner determines that the circumstances indicate that the tax has actually been withheld or collected and that any further delay will jeopardize the collection of the tax; or

6. Any other reason that in the Commissioner's discretion is sufficient to support the Commissioner's belief that delay may jeopardize collection.

(f) Requirements for a jeopardy assessment. The Commissioner will send a written notice of assessment to the taxpayer under the provisions of 830 CMR 62C.26.1(6)(f)-(i).